

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707400

AMBER WILKERSON,
EMPLOYEE

CLAIMANT

ST. EDWARD MERCY MEDICAL CENTER,
EMPLOYER

RESPONDENT

SISTERS OF MERCY HEALTH CARE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2010

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE MICHAEL HAMBY,
Attorney at Law, Greenwood, Arkansas.

Respondent represented by the HONORABLE RANDY MURPHY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and adopted
as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed March 1, 2010. The administrative law judge
made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission
has jurisdiction of this claim.
2. On June 24, 2007, the relationship of
employee-self insured employer-third party
administrator existed between the parties.

3. On June 24, 2007, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$404.00 for total disability and \$303.00 for permanent partial disability.

4. On June 24, 2007, the claimant sustained a compensable injury to her low back in the form of a herniated disc at L4-5.

5. There is no dispute over the claimant's entitlement to medical services through July 23, 2008.

6. The medical services provided to the claimant by and at the direction of Dr. Luke Knox on July 4, 2008, and July 15, 2008, represent reasonably necessary medical services for the claimant's compensable lumbar injury. Specifically, these medical services were necessitated by or connected with the compensable injury and had a reasonable expectation of accomplishing their intended purpose, at the time they were rendered, of diagnosing the nature and extent of the claimant's compensable injury and alleviating or reducing her symptoms and complaints. Pursuant to the provisions of Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule.

7. The medical services recommended by Dr. Peeples and Dr. Boxell, in the form of a psychological or psychiatric evaluation of the claimant, also represents reasonably necessary medical services for the claimant's compensable injury. Specifically, these services are necessitated by and connected with the claimant's compensable injury and have a reasonable expectation of insuring an accurate diagnosis of the nature and extent of her compensable injury and formulating an appropriate treatment program. Pursuant to the provisions of Ark. Code Ann.

§11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule.

8. There is no dispute over the claimant's entitlement to temporary total disability benefits through July 3, 2008.

9. The claimant has failed to prove that she continued to be rendered temporarily totally disabled, as a result of the effects of her compensable lumbar injury from July 4, 2008 through a date yet to be determined. Specifically, the claimant has failed to prove by the greater weight of the credible evidence that she continued within her healing period from the effects of this compensable injury on and after July 4, 2008.

10. The claimant has proven by the greater weight of the credible evidence that she sustained a permanent partial disability of 17 percent to the body as a whole as a result of the effects of her compensable lumbar injury. This includes permanent partial disability for a permanent physical impairment of 7 percent to the body as a whole and permanent partial disability benefits for a permanent functional disability or loss of wage-earning capacity in the amount of 10 percent to the body as a whole. Specifically, she has proven by the greater weight of the evidence that her compensable low back or lumbar injury of June 24, 2007 was the major cause of these degrees of percentages of permanent physical impairment and permanent functional disability. She has also proven that this degree of permanent physical impairment is supported by objective and measurable physical findings, was calculated in a manner that conforms to the Commission's official rating guide, and was calculated in a manner that gives no consideration to pain, straight leg raising, loss of range of motion or any other subjective findings.

11. The respondents have denied that the claimant sustained a compensable injury to her left hip, as a result of the employment-related accident of June 24, 2007, and controvert her entitlement to any benefits attributable to such injury or damage. The respondents controvert the claimant's entitlement to any permanent disability benefits, her entitlement to any further medical services after July 3, 2008, and her entitlement to any temporary total disability benefits that would accrue after July 3, 2008.

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits awarded.

13. The claimant has failed to prove that she sustained any physical injury to her left hip, as a result of the employment-related accident of June 24, 2007. Specifically, she has failed to establish the actual existence of any physical injury or damage to this portion of her body by medical evidence, which is supported by "objective findings" as that term is defined by Ark. Code Ann. §11-9-102(16) (A) (i).

After reviewing the entire record *de novo*, it is our opinion that the administrative law judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the administrative law judge are correct and are adopted by the Full Commission, except for an error in finding of fact No. 6. The administrative law judge found that Dr. Knox treated the claimant on July 4, 2008 and July

15, 2008. The record indicates instead that Dr. Knox treated the claimant on June 4, 2009 and July 15, 2009.

With the correct treatment dates noted, we affirm and adopt the March 1, 2010 decision of the administrative law judge, including the corrected findings and conclusions herein, as the decision of the Full Commission. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion finding that the claimant proved by a preponderance of the evidence that the medical services

provided by and at the direction of Dr. Luke Knox on July 4, 2008 and July 15, 2008 represent reasonable and necessary medical treatment; the finding that a psychological or psychiatric evaluation was reasonable and necessary medical treatment; the finding that the claimant was temporary totally disabled from July 4, 2008 through a date yet to be determined; the finding that the claimant had proven by a preponderance of the evidence that she sustained a 7% permanent anatomical impairment rating to the body as a whole as well as a 10% loss in wage-earning capacity; and the finding that the claimant sustained a physical injury to her left hip on June 24, 2007. Specifically, I concur in the finding that the claimant failed to prove she sustained physical injury to her left hip and the finding that the claimant failed to prove that she was entitled to temporary total disability benefits from July 4, 2008 through a date yet to be determined. However, I must dissent from finding that the claimant has proven by a preponderance of the evidence that the services provided to the claimant by and at the direction of Dr. Luke Knox on July 4, 2008 and July 15, 2008 represent reasonable and necessary medical treatment, the finding that the claimant was entitled to a

7% permanent anatomical impairment rating and the finding that the claimant sustained a 10% loss in wage earning capacity. In my opinion, the claimant has failed to meet her burden of proof.

The claimant sustained an admittedly compensable back injury on June 24, 2007, while working as an LPN for the respondent employer. The claimant went into a patient's room, pulled the patient up, and felt her low back pop. The claimant went to the emergency room at St. Edward's and followed up on the next day with Dr. Keith Holder at Cooper Clinic, P.A. Dr. Holder diagnosed the claimant with a lumbar strain, prescribed physical therapy, and released her to work with certain restrictions.

Dr. Holder treated the claimant for slightly less than a month until releasing her on July 19, 2007. In that report, Dr. Holder noted that the claimant's back was feeling somewhat better with pain at a level of 4 out of 10. The claimant was still reporting a shooting pain down her left leg to her calf, occasionally to the left lateral foot. Dr. Holder released the claimant to work 4 hours a day with sedentary duties. He also referred her to Neurosurgery and Orthopedics for additional treatment.

The claimant next treated with Dr. Christopher M. Boxell, a neurosurgeon in Tulsa, Oklahoma. Dr. Boxell saw the claimant on July 25, 2007, and noted impressions of degenerative lumbar disc disease, herniated nucleus pulposus in L4-L5, and left L5 radiculitis. Dr. Boxell recommended an epidural steroid injection. He also removed her from any work duties pending the outcome of the injections. The first epidural injection occurred on August 6, 2007 and the second injection occurred on August 27, 2007. On September 6, 2007, Dr. Boxell reported the claimant had 20% improvement following the second epidural steroid injection. He did not recommend any more injections and noted that the claimant was not willing to attempt any more steroid injections. He then recommended lumbar discography.

The discography occurred on September 11, 2007 and Dr. Boxell noted that the claimant exhibited exaggerated pain responses and very poor pain tolerance throughout the procedure, even when normal discs were injected. Dr. Boxell noted:

The patient wept for several minutes post completion of the injections and displayed exaggerated pain responses and very poor pain tolerance.

In a September 27, 2007, letter, Dr. Boxell stated:

I think the patient has some pain that is related to the disc degeneration. However, I strongly suspect that there is a component of psychological overlay, but I have no way of knowing what the basis of that is. I do know that the patient has a stressful personal life at the present time. I would not advise an operation in this setting. The patient did not have a good tolerance for the discogram procedure. In fact, I would rate her as probably the least tolerant patient that I have ever performed a discogram on. I would be reluctant to recommend a fusion to her because I do not believe she could handle the pain post-operatively.

In his deposition, Dr. Boxell confirmed that the claimant has reached maximum medical improvement based on what he could do as of August 18, 2007. When Dr. Boxell and the claimant met post discography, the claimant became very angry at Dr. Boxell because of his assessment of her exaggerated pain responses. Dr. Boxell noted that while the patient ambulated into the office with a limp, when she jumped off the examining table and bolted out of his office, he did not note any limp and that she possessed an extremely brisk gait.

The claimant treated with Dr. Reginald Rutherford in 2008, who noted that:

There is no objective abnormality identified on [the claimant's] examination. The weakness noted is non-physiological in character and if a true physical finding, would not be compatible with independent unrestricted ambulation. I do not believe an further diagnostic tests are required. It is recommended [the claimant] undergo an FCE with Rick Byrd, following which she should follow-up with Dr. Scott Schlesinger for final recommendation.

Following the FCE recommended by Dr. Rutherford, Dr. Schlesinger determined that the claimant had reached maximum medical improvement and there was nothing to give a disability rating for.

The claimant treated with Dr. Knox on July 4, 2009 and July 15, 2009. On July 4, 2009, Dr. Knox reviewed the claimant's MRI scans and discograms and was unimpressed with their findings from the standpoint of her neurological deficit. He noted that the deficit appeared to be out of proportion to the findings of the MRI. He recommended that the claimant re-do the MRI scan to be certain that nothing has changed. He suspected that she may have had significant neural foraminal encroachment at L4-5.

On July 15, 2009, the new MRI concluded that her exam was without change. He noted a significant disc

herniation at L4-5 on the left, however, he did not see why she could not return to work on a restricted basis. He contemplated several possibilities including a good Aspen Brace or a microdiscectomy.

The claimant underwent an independent medical examination by Dr. Earl Peeples. Dr. Peeples reviewed all the relevant records and examined the claimant. He determined that the claimant's current conditions and failure to improve after significant treatment are attributable to psychological conditions and are non-organic in origin. He recommended that the claimant have MMPI testing. Dr. Peeples recommended against any type of surgical or other aggressive treatment. Finally, he could not identify any physical structure that would prevent the claimant from working.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989

(Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The evidence demonstrates that the claimant is not entitled to additional medical treatment other than the psychological evaluation. The claimant has been treated by three neurosurgeons, a chronic pain management specialist, a neurologist and an orthopedic surgeon. The overwhelming majority of these treating physicians and a doctor who performed an independent medical evaluation have determined that no additional treatment would assist the claimant. Dr. Boxell, who treated the claimant following her compensable injury and is a neurosurgeon, concluded that on August 18, 2007, that the claimant with a 7% permanent partial impairment to the whole person. At that time, he had no other recommendations other than the claimant required chronic pain management for her condition. He also assessed

the claimant as needing a psychological evaluation and therapy. He noted at that time that the claimant's response to the discogram was similar to patients who have post traumatic stress disorder. When Dr. Boxell had seen the claimant on September 27, 2007, he stated that he was reluctant to advise surgery. He stated:

I think the patient has some pain that is related to the disc degeneration. However, I strongly suspect that there is a component of psychological overlay, but I have no way of knowing what the basis of that is. I do know that the patient has a stressful personal life at the present time. I would not advise an operation in this setting. The patient did not have a good tolerance for the discogram procedure. In fact, I would rate her as probably the least tolerant patient that I have ever performed a discogram on. I would be reluctant to recommend a fusion to her because I do not believe she could handle the pain post-operatively. I do not think this patient can return to floor nursing. I think she needs retraining and a move to a less physically demanding type of work. I do not personally believe that she can left over 20 pounds repetitively and only up to 20 pounds on rare occasions. She is not going to be able to sit for prolonged periods of time.

When the claimant returned to the Dr. Boxell after having the discogram performed, she was angry when Dr. Boxell entered the room. In a note dated October 18, 2007

addressed to the adjuster, Dr. Boxell noted that the claimant informed Dr. Boxell she was angry because the discogram report stated that she displayed exaggerated pain behaviors.

Dr. Peeples performed an independent medical evaluation on the claimant on November 4, 2009. In a letter dated November 6, 2009, Dr. Peeples noted that surgical intervention was "strongly contra-indicated and should not be performed."

Dr. Knox has recommended additional treatment for the claimant in the form of surgical intervention. It is clear from the medical records that surgical intervention is not going to cure the claimant's problems, nor is anything short of her getting a psychological evaluation. The respondents are not responsible for the treatment the claimant received from Dr. Knox on July 4th and the 15th. The claimant got a change of physician to Dr. Knox. The respondents are only required to pay for the one-time examination, which they did. Dr. Knox has not provided the claimant with any additional treatment. All the treatment she has been provided with is related to her left hip joint which is very clearly not related to the June 24, 2007

injury. Further, Dr. Knox has recommended surgery, which every other physician has stated was not a good idea. Simply put, I cannot find that any additional medical treatment is reasonable and necessary. Therefore, I must dissent from the majority's award of benefits.

With respect to the permanent anatomical impairment of 7% as assigned by Dr. Boxell, I find that the claimant is not entitled to any permanent anatomical impairment. I do concede, however, that if impairment were warranted, 7% would be a reasonable impairment rating based upon Table 75. However, in my opinion, all the claimant's problems are all degenerative in nature. When Dr. Peeples did his IME, he stated that the claimant had significant degenerative disc disease at L4-5. He stated:

Insofar as Ms. Wilkerson is concerned, there is no anatomic evidence of injury definitively attributable to the incident at work for which to base impairment or restriction from employment. There is disc abnormality at the L4-5, but disc abnormality is always seen when a relatively advanced degenerative condition occurs. There is no significant compression in my opinion based on my examination and multiple previous examinations including the careful examinations of Dr. Boxell.

The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Commission

is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

In my opinion, I give more weight to the opinion of Dr. Peeples, who has recently examined the claimant and has found that she has no permanent anatomical impairment.

Accordingly, I must dissent from the majority's award of a 7% permanent anatomical impairment.

Even if I were to find that the claimant was entitled to a permanent anatomical impairment rating, a finding which I do not make, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits in addition to the permanent anatomical impairment.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, she is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504

(1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may also include motivation, post-injury income, credibility,

demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The evidence demonstrates that every physician that has treated the claimant has recommended that she return to work with certain minor restrictions. In fact, the claimant was offered a secretarial position with the respondent employer which she refused. Therefore, when I

consider that the claimant is of relatively young age, and has been an LPN for at least 20 years, and all other things considered in evaluating wage loss, I cannot find that the claimant has proven by a preponderance of the evidence that she is entitled to any wage loss disability benefits in addition to her permanent anatomical impairment. Therefore, I dissent from the majority's award of wage loss disability benefits.

KAREN H. MCKINNEY, Commissioner